

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB 6/18/99  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re Leiner Health Products Inc.

---

Serial No. 74/359,579

---

Michael A. Painter of Isaacman Kaufman & Painter for Leiner Health Products Inc.

Kelley L. Wells, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

---

Before Seeherman, Hairston and Wendel, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Leiner Health Products Inc. has appealed the refusal of the Trademark Examining Attorney to register ANTIOXIDANT PAK on the Supplemental Register for "vitamins and dietary food supplements."<sup>1</sup> Registration has been refused pursuant to Section 23 of the Trademark Act on the ground that the

term applicant seeks to register is incapable of distinguishing its goods from those of others. Specifically, the Examining Attorney contends that ANTIOXIDANT PAK does nothing more than name applicant's goods.

Applicant and the Examining Attorney have filed appeal briefs. An oral hearing was not requested.

Before turning to the substantive issue in this case, we must address a procedural point. In response to the Office action initially refusing registration on the Supplemental Register, applicant submitted a declaration from its vice president asserting his belief that ANITOXIDANT PAK had become distinctive by reason of "substantially exclusive use thereof as a mark by the Applicant in commerce since October, 1992 and Applicant's ownership of a related Certificate of Registration of the trademark DAILY PAK." The statements made by applicant in its response show that applicant was not asserting that its mark was registrable on the basis of Section 2(f) and, indeed, the Examining Attorney pointed out that a claim of acquired distinctiveness under Section 2(f) is of no avail in a case where the mark has been determined to be

---

<sup>1</sup> Application Serial No. 74/359,579, filed on February 16, 1993, and asserting first use and first use in commerce on October 12,

incapable of distinguishing the applicant's goods. Applicant's papers indicate that the language regarding acquired distinctiveness was not meant to indicate a Section 2(f) claim, but only that evidence of acquired distinctiveness should be considered in evaluating applicant's claim that its mark was capable of distinguishing its goods. Therefore, the entry in the file, and in the Office records, that the application is proceeding under Section 2(f) is in error, and the Office records will be corrected.

Section 23 of the Trademark Act provides that a mark is registrable on the Supplemental Register if it is capable of distinguishing the applicant's goods or services. Thus, the substantive issue on appeal is whether or not ANTIOXIDANT PAK is capable of distinguishing applicant's vitamins and dietary food supplements from those of others.

The Examining Attorney contends that ANTIOXIDANT PAK is a generic term for a pack of antioxidant vitamins, that applicant's goods are antioxidants sold in packet form, and that this term is therefore incapable of distinguishing the goods. In support of her position, she has made of record

dictionary excerpts defining "antioxidant" as "Biochem. An enzyme or other organic substance, as vitamin E or Beta-Carotene, that is capable of counteracting the damaging effects of oxidation in animal tissues" and "pak" as "pack; package,"<sup>2</sup> as well as a definition of "pack" as "a small package containing a standard number of identical or similar items <a pack of gum>; a complete set of related items <a pack of playing cards>."<sup>3</sup> We also note the additional definition of "pack" as "a collection of items tied up or wrapped: bundle."

The Examining Attorney has also made of record excerpts from the NEXIS date base which refer to antioxidants, including the following:

The researchers said vitamin E, an antioxidant, might reduce heart disease by having an effect on low-density lipoprotein, or LDL, cholesterol...  
"The Dallas Morning News," May 20, 1993

... today's issue of the New England Journal of Medicine, provide important backing for the much-heralded theory that antioxidants--which include vitamins E, C and the nutrient beta carotene--lower cholesterol and thus cut the risk of coronary disease.  
"Los Angeles Times," May 20, 1993

Vitamin E belongs to a class of micronutrients called antioxidants,

---

<sup>2</sup> Random House Unabridged Dictionary, 2d ed.

<sup>3</sup> Webster's II New Riverside University Dictionary, © 1984.

which include vitamin C and beta carotene.

"USA Today," May 20, 1993

Results--Low serum concentrations of antioxidant vitamins predicted the development of senile cataract...

"JAMA," March 3, 1993

In addition, the Examining Attorney has submitted third-party registrations for "PAK" marks, e.g., VITALITY PAK, AM PAK and KALM PAK for various dietary and nutritional supplements in which the word PAK was disclaimed, in order to show that the Patent and Trademark Office has treated "pak" as a descriptive term for such goods.

Finally, the Examining Attorney has pointed out that applicant's specimen packages show that its goods contain the vitamins C, E and beta carotene, and that the goods are in packet form. In fact, we note that the packaging touts the product as a "high potency multivitamin system with vitamins C, E and beta carotene," and that the package contains "30 packets/30 day supply, 2 tablets/2softgels per packet." The back of the package includes the following statement:

*Your Life®* **Antioxidant Pak™** provides an easy, convenient way to supplement your diet. Each individual packet includes Vitamins C, E and Beta Carotene, three of nature's antioxidant nutrients. In addition, it provides 10 essential

vitamins and 7 key minerals for  
complete and convenient nutritional  
insurance.

The package also features a picture of an individual packet with 4 pills, and the statement "Each packet contains the following nutrients...."

The evidence shows that "antioxidant" is a term used in both technical and popular literature, as well as on applicant's own specimens and in dictionary definitions, to refer to vitamins C and E and beta carotene. The evidence further shows that PAK is the equivalent of the word "pack." As shown by the specimens, applicant's product consists of packs containing antioxidant vitamins. When the two words, ANTIOXIDANT and PAK, are combined, the resulting term ANTIOXIDANT PAK is a generic name for applicant's goods, and would be recognized as such by the consuming public. See **In re Gould Paper Corp.**, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987). Accordingly, ANTIOXIDANT PAK is incapable of distinguishing applicant's goods from those of others. See **In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.**, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987).

In reaching this conclusion, we have taken into account the declaration of Robert Guzewicz and the exhibits attached thereto with respect to the bearing

applicant's assertions of acquired distinctiveness have on the issue of genericness. See **In re Paint Products Co.**, 8 USPQ2d 1863 (TTAB 1988). Aside from the fact that this evidence of acquired distinctiveness is very limited--a statement that applicant has made substantially exclusive and continuous use of the term since October 1992; an assertion of "substantial" sales; a statement that promotional materials have been distributed to applicant's wholesale customers; and ownership of a different mark, DAILY PAK, for vitamins and mineral dietary food supplements)--any de facto secondary meaning which the designation may have acquired cannot render the designation registrable if the evidence as a whole establishes that the designation is primarily perceived by the purchasing public as a generic reference. See **In re Audio Book Club, Inc.**, \_\_USPQ2d\_\_, Ser. No. 74/567,910 (TTAB May 11, 1999).

Decision: The refusal of registration is affirmed.

E. J. Seeherman

P. T. Hairston

H. R. Wendel  
Administrative Trademark Judges  
Trademark Trial and Appeal Board